IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9601 of 1995

Date of decision: 27th September 1996

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and

MR.JUSTICE S.D.PANDIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? No

2. To be referred to the Reporter or not? No @@ To be referred to the Reporter or not? No @@ To be ref rred to the Reporter or not? No @@ To be referred to the Reporter or not? No @@ To be referred to the Reporter or not? No @@ To be referred to the Reporter or not? No @@ To be referred to the Reporter or not? No @@ To be referred to the Reporter or not? No @@ To be referred to the Reporter or not? No @@ To be referred to the Repo ter or not? No @@ To be referred to the Reporter or not? No @@ To be referred to the Reporter or not? No @@ To be referred to the Reporter or not? No ferre

3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

DIGVIJAY CEMENT CO LTD

Versus

COMMISSIONER OF INCOME TAX

Appearance:

MR RK PATEL for Petitioner

MR MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE N.J.PANDYA and
MR.JUSTICE S.D.PANDIT

Date of decision: 27/09/96

C.A.V. JUDGEMENT (Per N.J.Pandya,J.)

The petitioner filed its return of income on 27th December 1991 in which the computation showed that after accounting for income and expenditure, the brought forward loss would come to Rs.25,00,09,100/-. This loss also included long term capital loss of Rs.1,82,000/-. Naturally, so far as the income is concerned, the return indicated "nil" income.

2. The assessing Officer, in exercise of his power under Sec.143(1)(a) of the Income-tax Act, 1961 (hereinafter referred to as "the said Act") issued intimation that the amount of loss claimed is liable to be reduced by Rs.4,29,97,215/-. This comprised of two items. One related to Rs.4,26,43,803/- towards interest on outstanding sales tax disallowed under Sec.43(B) and second one related to Rs.3,53,412/-towards presentation articles in excess of Rs.200/- in value.

3. On receipt of the said intimation, the petitioner filed an application under Sec.154 of the said Act. The case putforth was that adjustments made by the Assessing Officer were not "prima facie inadmissible". The said contention was based mainly on the circular issued by the Central Board of Direct Taxes being "Instruction No.1814 dated 4-4-1989. The correct test in this regard has been laid down by the Supreme Court in the case of Messrs Volkart Bros--82 ITR p.50 Moreover, the said circular also clarified that if the claim is supported by decision of any High Court or any other appellate authority, it cannot be said to be prima facie inadmissible.

4. According to the petitioner, in connection with both the aforesaid items, there were supporting decisions. They are: 50 ITR 495 Madras, 82 ITR 363 SC, 130 ITR 267 (Calcutta). In support of the 2nd item also, similar decisions were relied on by the petitioner.

5. It was further pointed out by the petitioner that

even after the aforesaid proposed adjustments, there was balance of huge loss and hence, there was no question of levying any additional tax under Sec.143 (1A)(a) of the said Act. For this reliance was placed on 193 ITR 91 and 195 ITR 485. The petitioner, therefore, requested that an order of rectification be passed. This request came to be accepted as per Exhibit C dated 19-5-1992. Thereafter, the assessing Officer issued notice under Sec.143(2) dated 27-8-1992 and proceeded to assess the income of the petitioner which he concluded by his order dated 23-3-1994 as per the provisions of Sec.143(3).

6. In the meantime, on 12-11-1992, respondent no.1 issued notice under Sec.263 of the Income-tax Act questioning the validity of Order Exh.C under Sec.154 dated 19-5-1992. This matter of notice under Sec.263 remained pending for quite some time. However, the petitioner did submit its arguments in writing on 30-11-1992 challenging the proposed action under Sec.263. The proposed action under Sec.263 was challenged on all counts, as set out in the petition para 9. The matter rested there and the petitioner did not receive any communication pursuant thereto.

7. So far as the exercise under Sec.143(3) is concerned, as stated earlier, it concluded in the assessment order under Sec.143(3) on 23-3-1994 wherein both the aforesaid claims were disallowed by the Assessing Officer along with various other disallowances and additions. Against the returned loss of Rs.25 crores and odd, the petitioner was finaly assessed at a loss of Rs.15,89,05,892/- and the income was computed at nil permitting carry forward of loss to the tune of Rs.12,79,88,164/-. The said assessment order is at Exh.G.

8. After a lapse of more than 2 years, respondent no.1 issued a fresh notice under Sec.263 on 20-1-1995 proposing the same course of action as was proposed int he said earlier notice of November 1992.

9. The petitioners pointed out that neither the intimation under Sec. 143(1)(a) nor the Order under Sec.154 survived in view of the fact that the Assessing Officer had framed final assessment order under Sec.143(3) and there is no question of now proceeding further under Sec.263. The petitioner also relied on its earlier submission dated 30th November 1992-Annexure F.

10. Inspite of this, the respondent continued with the proceedings and passed order under Sec.263 on

27-3-1995 cancelling the order under Sec.154.

11. It is this order which is under challenge before us by way of this petition.

12. It is obvious that exercise under Sec.263, after the assessment under Sec.143(3) came to be concluded on 23-3-1994 was at best academic. Otherwise also, in face of the said circular issued by the Central Board of Direct Taxes, there was no sanction for the respondent to exercise his power under Sec.263. It is not possible to hold that action taken by the Assessing Officer under Sec.154 along with said CBDT Circular was in any manner bad. Least that was expected of respondent no.1 was that he would deal with CBDT circular and justify his action. He does not do so.

13. Both on the count of ignoring CBDT Circular and also on the count that final assessment order under Sec.143(3) has been concluded, the action taken under Sec.154 in relation to that very assessment by the Assessing Officer in view of his initial action under Sec.143(1)(a) has lost its efficacy. We therefore, find that the impugned order cannot be sustained.

14. Submission was made by the learned Advocate appearing for the petitioner that once notice under Sec.143(2) is issued, proceedings must be brought to their logical conclusion under Sec.143(3). It was further submitted that Sec.143(1)(a) can never be resorted to thereafter. Muchless, therefore, there could be any recourse to power under Sec.154 of the Income-Tax Act. This would necessarily mean that if at all there is an order under Sec.143(1)(a) succeeded by 143(2) notice, it should be taken to have lost its efficacy or will have no existence in the eye of law. Looking to the facts and circumstances of the case, in our opinion, we are not required tto consider this submission at all. The matter can be decided on the aforesaid basis. Hence, we do not deal with the same.

15. Before parting with the order, we may mention that two decisions given in SCA No.1047 of 1996 and SCA No.425 of 1996 were cited, which are not required to be referred to for giving a decison in the instant case. Same is the position with regard to the decision of Delhi High Court in Apogee International Ltd. & Ano. Vol. 220 ITR 248.

16. The petition is, therefore allowed. The impugned order is quashed and set aside. Rule is made absolute

with no order as to costs.

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